

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

74-2401

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CHAN YUK PO,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

Appellant's Brief

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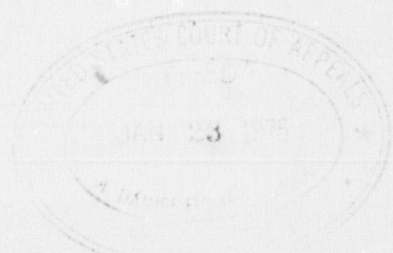


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**UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CHAN YUK PO,

Defendant-Appellant.

PRELIMINARY STATEMENT

Po appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on October 25, 1974 after a trial before the Honorable, Inzer B. Wyatt, United States District Judge and a jury.

Indictment #792/74 filed on August 14, 1974 against defendants, Chan Yuk Po, Tony Moy and Lai Lai Kuen contained two counts, one, conspiracy to violate Controlled Substance Act, Section 812, 841(a)(1) and 841(b)(1)(4) of Title 21, United States Code. In Sub-Title (2), it was charged that defendants would distribute and possess narcotic drugs in violation of law. Under that count, three overt acts are set forth:

1. That on July 16, 1974, defendant, Tony Moy went to apartment #70 at 50 Bayard Street, New York, New York.
2. That on July 16, 1974, defendant, Chan Yuk Po gave Lai Lai Kuen a package containing heroin.

3. That on July 16, 1974, Lai Lai Kuen possessed and distributed heroin at 50 Bayard Street, New York, New York.

The second count charges that all of the defendants on July 16, 1974 did distribute and possess heroin in violation of law.

Defendants, Tony Moy and Lai Lai Kuen were permitted to plead guilty to Count One, conspiracy.

The trial against Chan Yuk Po proceeded on September 9, 1974 and was completed on September 12, 1974. The jury brought in a verdict of guilty on Count I, the conspiracy count, and not guilty on Count II setting forth the distribution and sale of heroin on July 16, 1974 in violation of law.

Defendant, Chan Yuk Po was sentenced on October 25, 1974 to a three year term to be followed by special parole for two years.

Defendant, Chan Yuk Po duly filed a notice of appeal at the direction of the Court on October 25, 1974.

STATEMENT OF FACTS

The testimony of Lai Lai Kuen (Lai) and Tony Moy (Moy) concerning their relationship with Chan Yuk Po commenced in the middle of April 1974 when they met in a coffee shop in downtown New York.

After a second meeting, Po told Moy and Lai that he needed \$2,000.00 to pay off gambling debts. Lai lent him the money (T.21).

About two or three weeks later, Po told Lai that he was going to Hong Kong on business and to buy Chinese medicine (T.21). That he needed \$3,000.00.

On his second phone call from Hong Kong, Lai promised to send him \$3,000.00. The Court asked whether she knew that Po was going to buy heroin, Lai said no. (T.23).

Lai testified that Po came back from Hong Kong about two or three months later and in or about July 16, 1974 visited her. He left and then came back later. Both Lai and Moy were present. Lai testified that Po had taken apart a radio and showed her a white powder. She stated that in Chinese it is heroin (T.27). She then testified that he took the white powder away (T.28).

Lai asked Po when she would get the money back that she loaned him, he said he would pay it back when the substance was sold (T.29).

The Government conceded that there were no fingerprints on the radio, nor was any heroin found in the instrument (T.30). She further testified that she did not receive the money she had loaned Po. (T.34).

The Court further asked Lai why she lent Po large sums of money and she stated that Moy had asked her to do so and she did so (T.36). Lai testified that on or about July 16, 1974, Po met her and asked her to deliver the heroin and that he would pay her back the loan and upon repayment of the loan, he would pay her interest of about \$1,000.00 (T.39).

There was testimony that Lai and Moy had met Po in a coffee shop and that Moy was asked to check about the money to be paid (T.41). Lai said that later she met Po and he gave her a bag of heroin. She returned to 50 Bayard Street, New York, New York and was arrested.

Upon cross examination, Lai admitted that Po never talked about heroin before he left for Hong Kong. She further stated that when she talked about the \$3,000.00 loan, he told her he was buying Chinese medicine. She was

further asked whether anything was said about narcotics and she said no (T.54).

Further on cross examination, Lai admitted that the product shown her by Po was white powder but she did not know whether it was heroin. She did not know what heroin was (T. 60-61).

Moy, the other defendant, testified in essence corroborating the testimony of Lai. That Po needed a \$3,000.00 loan when he went back to Hong Kong; that he would buy Chinese medicine (T.68). He repeated the nature of the loan as stated by Lai and the use he would put the money to (T.70). Moy also claimed that when the radio was opened, he saw white powder and he was told it was heroin (T.74). Po then took it away (T.75). He then testified that he found a customer for Po. That he proceeded to sell the product and that he was arrested.

On cross-examination, Moy admitted that he had never seen heroin and did not know what it was (T.80,87). Moy also admitted that on the two occasions before a court hearing in connection with the crime, he never mentioned Po's name to the investigators (T. 90, 92).

The rest of the testimony by the Government consisted of government investigators and technical experts. They had nothing to do with Po directly. The experts testified to the contents of the three packets, to the fact that there were no fingerprint marks on the radio and no residue of heroin in the radio.

The jury brought in a verdict of not guilty on Count II, the substantive act, and guilty on Count I with the three overt acts. The overt act, #II and the conspiracy count #I is in essence the same as the charge set forth in Count II of the indictment.

POINT I**IN VIEW OF THE JURY'S VERDICT OF NOT GUILTY ON COUNT II, THERE WAS NO EVIDENCE THAT THE DEFENDANT WAS A PARTY TO A CRIMINAL CONSPIRACY.**

There was no evidence to establish that defendant was a party to a criminal conspiracy before the acts which took place on July 16, 1974. The jury brought in a verdict of not guilty against defendant as to what occurred on July 16, 1974.

A careful reading of the testimony of Lai Lai Kuen and Tony Moy before July 16, 1974 does not disclose a plan to commit criminal acts.

The testimony of both witnesses discloses that Lai Lai Kuen and Tony Moy after meeting Po on two occasions, lent him \$2,000.00 to pay off gambling debts and then promised to lend him \$3,000.00 to make purchases of Chinese medicine in Hong Kong. The \$3,000.00 was sent to the defendant in Hong Kong after request by phone and letter from Hong Kong.

Both witnesses admitted that defendant never said anything to them about bringing back narcotics from Hong Kong or elsewhere before he left the United States.

Furthermore, there was no testimony that defendant, Lai Lai Kuen and Tony Moy agreed to be co-venturers or partners with Po. There was no agreement or testimony that they would share in any profits in Po's activities. The witness, Lai Lai Kuen testified that she would receive as interest \$1,000.00 upon the loans she had made to Po.

The testimony of Lai Lai Kuen and Tony Moy constituted the only evidence of the relationship between the

parties. No inference or conclusions can be drawn other than from the testimony given by the Government witnesses.

The testimony of Lai Lai Kuen and Tony Moy then indicated that upon Po's return to New York on or about July 16, 1974, defendant Po had brought a radio to Lai Lai Kuen. That the radio was opened and a white chemical was produced from it; defendant stated that it was heroin but they did not know what it was because they did not know what heroin was and had never seen it. They also testified that Po took the substance with him. These witnesses had pleaded guilty and were cooperating with the Government.

It was then stated that Moy had been asked whether he could find a buyer of the heroin and he said he could. The testimony of these witnesses then proceeded to what happened thereafter. Since the jury had acquitted defendant on the charges of the acts and occurrences on July 16, 1974 set forth in Count II of the indictment insofar as the defendant was concerned, that finding determined that the defendant was not guilty of the acts of July 16, 1974.

POINT II

THE ACQUITTAL OF DEFENDANT ON COUNT II CONSTITUTED A DISPOSITION OF THE SAME CHARGE CONTAINED IN THE CONSPIRACY COUNT I AGAINST DEFEN- DANT.

The indictment in this prosecution contained one count of conspiracy alleged to have commenced in or about June 1974. The verdict of not guilty of the defendant of the acts alleged to have been committed on July 16, 1974 was a final

disposition of that charge and may be construed to be res adjudicata or collateral estoppel as to the same charge contained in the conspiracy count.

The defendant cannot be found not guilty of the same alleged occurrence in one count of the indictment and guilty in another similar count on the same facts. Of course, if other independent evidence was produced establishing the criminal conspiracy, then the verdict might stand. But defendant contends that the remaining evidence did not establish any criminal conspiracy as set forth in Point I.

In the instant case, the charge in the substantive counts are similar and identical to overt act II set forth in the conspiracy charge Count I and the facts set forth therein were the same.

There being no independent evidence other than as testified to link defendant Po with the acts of Lai Lai Kuen and Tony Moy as charged in the conspiracy count, there is no basis for charging Po with participation in a conspiracy. The doctrine of collateral estoppel or that a judicial determination was made favorable to the defendant should cause the dismissal of the remaining charge.

In *Pereira v. U.S.*, 347 U.S. 1, the Court held that an acquittal on a substantive charge does not prevent a conviction for a conspiracy to commit the offense substantively charged unless the necessary proof of the substantive charge is identical with that required to connect the conspiracy count. See *United States v. Rabinowich*, 238 U.S. 78; *Thomas v. United States*, 314 Fed.2, 936 and *United States v. Fassoulis*, 445 Fed.2, 13.

POINT III**DEFENDANT'S COUNSEL'S FAILURE TO
MOVE TO SET ASIDE THE JURY'S VERDICT
AS TO COUNT II SHOULD NOT BAR CON-
SIDERATION OF INNOCENCE OF
DEFENDANT.**

When the jury came in with its verdict of not guilty on Count II and guilty on Count I, (conspiracy), defendant's counsel asked permission to reserve his motion to vacate the verdict of the jury until the date of sentence.

The venerable counsel for the defendant then failed to prepare or submit moving papers on the day of sentence to vacate the verdict.

Furthermore, defendant's counsel failed to make even an oral motion to vacate the verdict on the remaining count.

There is no doubt that serious questions existed as to the sufficiency of the evidence against defendant in view of the acquittal on Count II of the indictment. Yet nothing was done to raise this question before the Court below. Nothing was done to submit appropriate supporting briefs on this question for consideration by the court below.

If the contentions raised in this appeal have any substance, the failure of counsel to do so should not be permitted to bar defendant for it would result in a gross and manifest injustice. The failure to do so would result in depriving the defendant of proper representation in violation of his constitutional rights.

The Court has inherent jurisdiction to review the records and determine whether the verdict of the jury should be vacated and set aside.

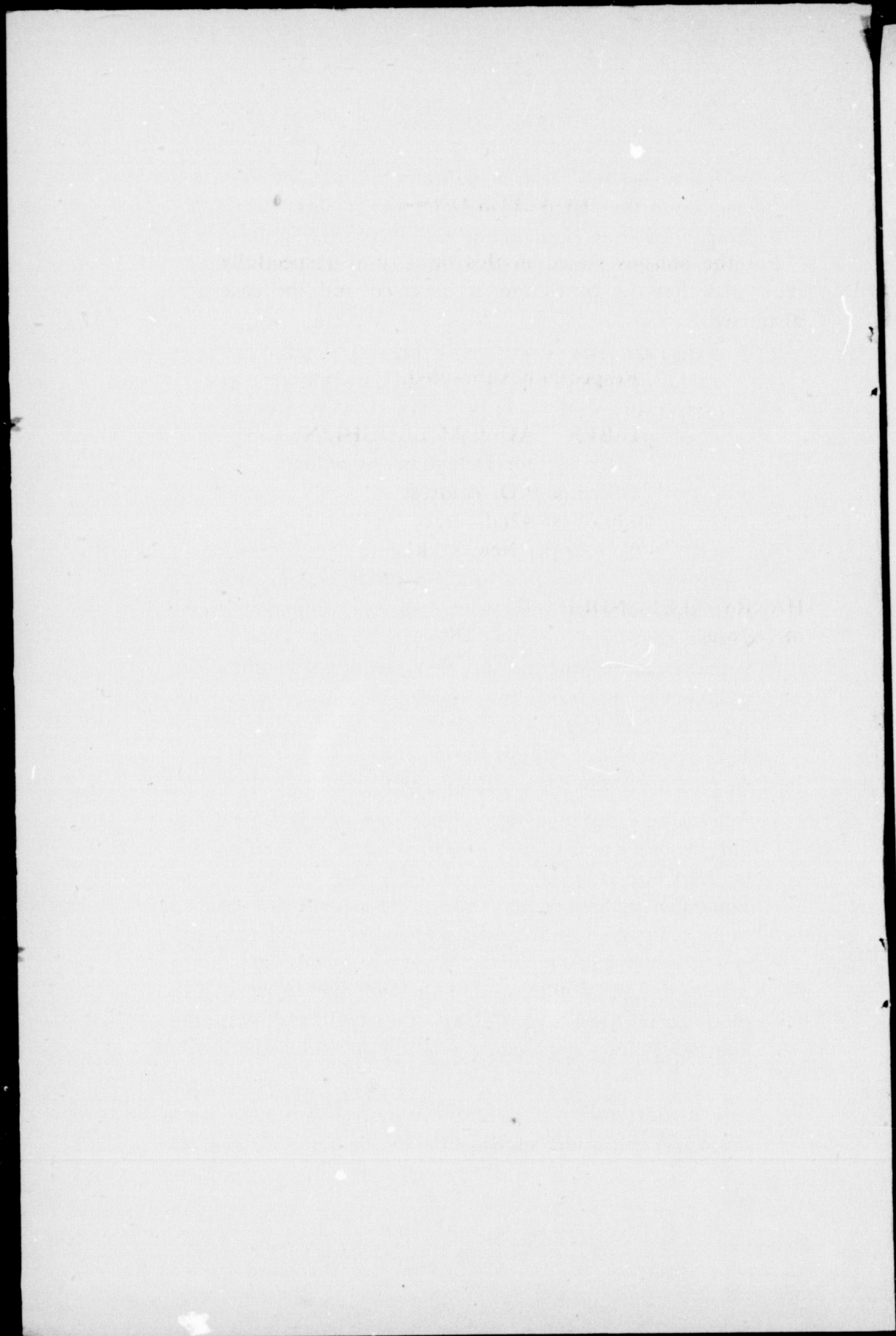
CONCLUSION

For the reasons stated in this brief, it is respectfully requested that the conviction be reversed and the case dismissed.

Respectfully submitted,

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STATE OF NEW YORK)

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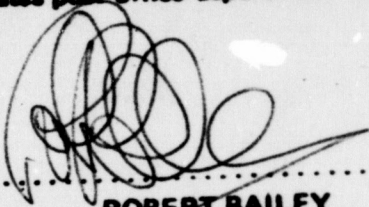
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10312. That on the 22 day of Jan. 1974 deponent served the within *Brief* upon *N.S. attorney*

attorney(s) for *Appellee*

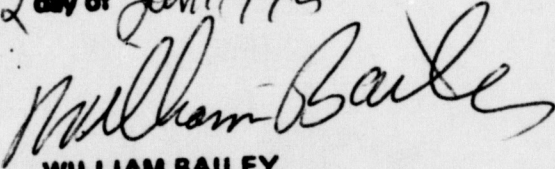
in this action, at *N.Y. Courthouse*
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the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this

22 day of Jan. 1975


WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976